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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 387

PHELPS DODGE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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August 29, 1940

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Phelps Dodge Corporation, respectfully prays that a writ of certiorari be issued to review certain portions of a decree of the United States Circuit Court of Appeals for the Second Circuit enforcing, in part, an order of the National Labor Relations Board.

Opinion Below

The opinion of said Circuit Court of Appeals, which was handed down on July 11, 1940, in a proceeding entitled *Phelps Dodge Corporation* vs. *National Labor Relations Board*, has not yet been officially reported but is printed in the Record (R. 923-930).

The Decision and Order of the National Labor Relations Board, part of which was enforced by the decree of the Circuit Court of Appeals, is reported in 19 N. L. R. B., No. 60 (1940) in a proceeding entitled *In the Matter of Phelps Dodge Corporation and International Union of Mine, Mill and Smelter Workers, Local No. 30*, and is printed in the Record (R. 837-919).

Statement of the Matter Involved

This petition involves questions arising under the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A. Section 151 et seq.), hereinafter referred to as the Act, and seeks the review of certain portions of a decree of the Circuit Court of Appeals for the Second Circuit, hereinafter referred to as the lower Court, enforcing, in part, an order of the National Labor Relations Board, hereinafter referred to as the Board.

Petitioner is engaged in the mining of mineral bearing ores at Bisbee, Arizona. After treatment at petitioner's smelter in Douglas, Arizona, all of this ore is shipped out of Arizona in interstate commerce (R. 614-620). In 1933 there was formed at Bisbee a labor organization, hereinafter called the union, and between the time of such formation and June 10, 1935, some of petitioner's employees became members. In June, 1935, petitioner had in its employ, in connection with its mining operations at Bisbee, approximately 950 persons (R. 530, 842). On June 6, 1935, petitioner discharged eight union men for cause (R. 844). On the following evening, June 7, 1935, because of these discharges the union membership voted to call a strike effective June 10, 1935 (R. 101-103, 844). No demand was made upon petitioner for the reemployment of these eight men, and petitioner was never given any notice of or statement of the reasons for the strike (R. 127-128, 657). On the morning of June 10, 1935, less than ten percent of the persons on petitioner's payroll ceased work and established picket lines (R. 101, 845).

For a period of approximately two weeks petitioner's mining operations were impaired as a result of this cessation of work, but by the end of June all of the strikers had been replaced and mining operations were normal (R. 531, 583, 584, 845). The picket lines, however, were still in existence. This was the situation which existed on July 5, 1935, when the Act went into effect.

On August 9, 1935, a committee representing the union called upon local officials of petitioner and agreed to call off the strike if petitioner would put back to work the eight men discharged on June 6 and all of those who had walked out on June 10. This was the first instance of any communication between the union and petitioner concerning any phase of the situation. On this occasion the local officials of petitioner advised the representatives of the union that the men could not be reinstated because their jobs had been filled. On August 23, 1935, a similar meeting was held at which the same proposal was made by representatives of the union and a similar reply given by the local officials of petitioner. Between August 9, 1935, and August 24, 1935, petitioner hired twenty-one new men. On August 24, 1935, the union officially terminated the strike and the picket lines were disbanded (R. 650, 654, 657, 845, 863).

With the possible exception of one or two individuals, none of the men who walked out on June 10, 1935, has been reemployed by petitioner. Of the individuals whose cases were before the Board most have at some time since August 24, 1935, made applications for reemployment to petitioner's employment agent, but none of them has been rehired. The Board found, on substantial evidence, that they were refused employment by the employment agent because of their participation in the strike. At the time of the hearing before the Board in January, 1938, the persons on petitioner's payroll numbered approximately 1,400, as compared with approximately 950 on June 10, 1935 (R. 842, 861, 863, 864).

On May 25, 1937, almost two years after the termination of the strike, the union filed charges under the Act against the petitioner alleging the commission of an unfair labor practice in refusing to "reinstate" six individuals who participated in the strike (R. 4). These charges were amended on December 18, 1937, and, as amended, included forty-seven men (R. 6-9). On January 10, 1938, the Board

issued a complaint against petitioner charging it with having engaged in unfair labor practices under subdivisions (1) and (3) of Section 8 of the Act in refusing to reinstate forty-eight individuals named therein (R. 10-27). Hearings on this complaint were held at Bisbee, Arizona, from January 27 through February 3, 1938. On March 16, 1938, the trial examiner's intermediate report was issued, and to this report petitioner filed with the Board exceptions and a supporting brief (R. 687-746). On May 5, 1938, petitioner presented oral argument to the Board, and on July 20, 1939, more than a year later, the case was reargued (R. 749, 836). The Board's Decision and Order was issued on January 16, 1940, which was approximately four and one-half years after the commission of the alleged unfair labor practices (R. 837-919).

In its Decision and Order the Board found that petitioner was guilty of unfair labor practices in systematically refusing to "reinstate" forty individuals, and ordered "reinstatement" of thirty-nine and back pay to all forty. The Board reached the conclusion of law that "the strike was a labor dispute involving a controversy over the tenure of employment of the eight union members discharged on June 8" (sic), "1935; that the strikers' work ceased as a consequence of that labor dispute which was current on July 5, 1935, the effective date of the Act; and that the strikers retained their status as striking employees on that date" (R. 862-863). The Board further concluded that "While it is true that the strikers' jobs had been filled by June 28, 1935, they occupied the status of striking employees on August 9, 1935, the date of their first mass application for reinstatement" (R. 863). Then, having found that between August 9 and August 24, 1935, petitioner hired twenty-one men but hired none of the strikers, the Board concluded that "on and after August 24, 1935, when the strike was formally ended, the strikers retained their status as employees, since between August 9, 1935, and the former date, the resumption of their status as working employees

had been discriminatorily denied them by the respondent's unfair labor practices" (R. 864).

Petitioner petitioned the lower Court to review and set aside the Board's order. The lower Court refused to enforce the Board's order of reinstatement as to two individuals on the ground that they were not employees of petitioner at the time the strike commenced, and hence no unfair labor practice was committed in refusing employment to them after the strike terminated, even though that refusal was predicated upon their strike activities (R. 928-929). The lower Court remanded the case to the Board as to twenty-one of the remaining thirty-eight individuals for further evidence and findings on the question of whether or not they had obtained "other regular and substantially equivalent employment" (R. 927). As to those twenty-one, however, the lower Court enforced the portion of the Board's order requiring the payment of back pay to them up to the time they obtained such other employment (R. 927). The lower Court further enforced the order to reinstate the other sixteen who had not obtained such employment and to pay them back pay, as well as back pay to the one other individual as to whom reinstatement was not ordered by the Board (R. 931-932). It specifically rejected petitioner's request for judicial relief from the excessive amount of the back pay award (R. 929).

This petition relates, therefore, solely to that portion of the lower Court's decree directing the payment of back pay to the twenty-one on the question of whose reinstatement the case was remanded to the Board and to that portion thereof directing reinstatement and back pay with respect to the other seventeen.

Jurisdiction

The decree of the lower Court was entered on July 26, 1940 (R. 930-933). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (43 Stat. 938; 28 U. S. C. A., Section 347).

Questions Presented

The following questions are presented by this petition:

1. Whether individuals who participate in a strike not occasioned by an unfair labor practice of their employer continue to be "employees" within the meaning of that term as defined in Section 2(3) of the Act, after the places of all strikers have been filled by other workers, operations have returned to normalcy, and all strike activities have ceased.

2. Whether it is an unfair labor practice for an employer to refuse application for a mass "reinstatement" of strikers when the strike was not occasioned by an unfair labor practice, the places of all the strikers have been filled, operations have returned to normalcy, there are insufficient new jobs available, and such "reinstatement" would necessitate the discharge of individuals hired to fill the places of the strikers, but picketing activities are still being carried on and the strike has not been officially terminated by the union;

3. Whether it is a denial to an employer of due process of law under the Fifth Amendment to the Constitution of the United States so to construe Section 2(3) referred to above as to clothe on July 5, 1935, the effective date of the Act, with the status of an "employee" an individual who, immediately prior to said date, stood in no such relationship with the employer;

4. Whether the Board has authority under Section 10(c) of the Act to order the payment of "back pay" to an individual as to whom the Board has no authority to order "reinstatement";

5. Whether an employer is entitled to judicial relief where the amounts of back pay awarded to individuals are arbitrary and excessive in view of the inexcusable delay

on the part of the union in filing charges and on the part of the Board in disposing of the case, and the employer has in no way occasioned such delay.

Reasons for the Allowance of the Writ

1. The decision of the lower Court, enforcing the Board's order of reinstatement with back pay, in holding that individuals who have participated in a strike not caused by an unfair labor practice of their employer still occupy the status of "employees" at a time when their places have been filled, the employer's operations have returned to normalcy, and all strike activities have ceased, involves the decision of an important question of federal law which has not been, but should be, settled by this Court and one which has been decided by the lower Court in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

2. The decision of the lower Court, enforcing the Board's order of reinstatement with back pay, in holding that a refusal of a proposal for mass reinstatement of strikers constitutes an unfair labor practice when the places of all the strikers have been filled, operations have returned to normalcy, and there are insufficient new jobs available, but picketing activities are still being carried on and the strike has not been officially terminated by the union, involves the decision of an important question of federal law which has not been, but should be, decided by this Court and one which has been decided by the lower Court in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

3. The decision of the lower Court, enforcing the Board's order of reinstatement with back pay, in holding that indviduals who went out on strike on June 10, 1935, whose places had been filled and whose employer's operations had returned to normalcy by June 28, 1935, were, on July 5, 1935, "employees" under Section 2(3) of the Act,

involves the decision of a federal question in a way probably in conflict with applicable decisions of this Court.

4. The decision of the lower Court enforcing an order of the Board for the payment of back pay without reinstatement to twenty-two persons involves a decision in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter.

5. The decision of the lower Court in refusing to afford petitioner judicial relief from an excessive and arbitrary award of back pay involves the decision of an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued in the above-named cause, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a transcript of the record in all proceedings had in such cause, to the end that so much of the decree enforcing the order of the National Labor Relations Board as is placed in issue by the questions presented by this petition may be reviewed and determined by this Court; that said order be set aside and reversed in such respects, and that petitioner be granted such other and further relief as may be just and proper.

Dated August 29, 1940.

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PHELPS DODGE CORPORATION,
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NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introduction

The opinion of the lower Court was handed down on July 11, 1940, in a proceeding entitled *Phelps Dodge Corporation* vs. *National Labor Relations Board,* and appears at pages 923-930 of the Record. It had not, at the time of the preparation of the petition, been officially reported. The Decision and Order of the Board, part of which was enforced by the decree of the lower Court, is reported in 19 N. L. R. B., No. 60 (R. 837-919). The text of the sections of the Act involved in the petition is set forth in the appendix to this brief. An explanation of the matter involved and the basis for invoking the jurisdiction of this Court are set forth in the foregoing petition. The following argument follows in numerical sequence the questions presented in the petition.

ARGUMENT.

1. Where, following a strike not caused by an unfair labor practice, the places of the strikers have been filled, the operations of the employer have become normal, and the strike has been officially terminated, the individuals who participated in such strike cease to be "employees" within the meaning of that term as defined in Section 2(3) of the Act.

The lower Court states in its opinion that "The sufficiently supported finding of the Board * * * carries the labor dispute into July 5th and that is enough to make the strikers employees within the meaning of the Act when they were refused reinstatement" (R. 926). To be sure, the proposal for mass "reinstatement" was made before the strike was officially called off by the union, but it was refused because the places of the strikers had been filled and there were not sufficient new jobs available to permit such mass "reinstatement" (R. 845). The discriminatory refusals to "reinstate" upon individual applications for employment all occurred, however, after August 24, 1935, the date upon which the union officially terminated the strike. The lower Court has held that the individuals involved were "employees" at the time of such discriminatory refusals.

This Court has not decided the question of when an individual on strike ceases to be an "employee" under Section 2(3) of the Act. It has clearly indicated, however, that individuals who participate in a strike not occasioned by an unfair labor practice lose their status as employees when their employer has resumed normal operation of his plant with a full complement of workers.

National Labor Relations Board vs. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 83 L. Ed. 660 (1939).

The Board itself has specifically held on two occasions that where strike activities have ceased such individuals are not to be considered as "employees" in determining controversies over representation under Section 9 of the Act.

In the Matter of Standard Insulation Company, Inc., 22 N. L. R. B., No. 46, 6 L. R. R. 267* (1940); *In the Matter of Standard Lime & Stone Co.*, 17 N. L. R. B., No. 7, 5 L. R. R. 293 (1939).

This Court has held that under Section 10(c) of the Act the Board's authority to reinstate is limited to those who occupy the status of "employees."

National Labor Relations Board vs. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 83 L. Ed. 627 (1939).

Petitioner respectfully submits that the decision of the lower Court on this question to the effect that these individuals continued to be "employees" of petitioner after the strike had been terminated and that as such they were subject to the Board's authority to reinstate involves an important question of federal law which should be settled by this Court. The Act, although providing administrative redress for unfair labor practices, at the same time preserves the right to strike. It does not, however, petitioner respectfully maintains, remove from labor organizations the risk of losing strikes and suffering the consequences of taking such direct action at least when such action is not occasioned by unfair labor practices on the part of employers. Petitioner submits that a decision by this Court on this important question whereby both labor and industry would be advised of their respective rights and liabilities under the Act would serve greatly to diminish the number of unjustifiable labor disputes which presently operate to impede the free flow of commerce between the several states.

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* Labor Relations Reporter, published by The Bureau of National Affairs, Inc., Washington, D. C.

2. It is not an unfair labor practice for an employer to refuse a proposal for mass "reinstatement" of strikers when the strike was not occasioned by an unfair labor practice, the places of all the strikers have been filled, operations have returned to normalcy, there are insufficient new jobs available, and such "reinstatement" would necessitate the discharge of individuals hired to fill the places of the strikers, but picketing activities are still being carried on and the strike has not yet been officially terminated by the union.

The foregoing statement is one of the situation which on the Board's own findings existed on August 9 and August 23, 1935, when the union representatives proposed to the petitioner that they would call the strike off if petitioner would "reinstate" the eight men discharged on June 6th and all of the approximately ninety-five individuals who went out on strike on June 10th. The Board found the rejections of this proposal, in the light of petitioner's hiring twenty-one new men between August 9th and August 24th, an unfair labor practice. The lower Court by enforcing the Board's order has approved that finding.

The lower Court's decision is in direct conflict with the principle declared by this Court to the effect that where a strike has not been caused by an unfair labor practice an employer has not, under the Act, lost the right to protect and continue his business by supplying places left vacant by strikers and is not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment.

> *National Labor Relations Board* vs. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, [illegible], 82 L. Ed. 1381, 1390 (1938).

The lower Court's decision in this respect also involves an important question of federal law which has not, but

should be, settled by this Court. When, under the Act, does a labor dispute cease to be "current"? The effect of the lower Court's decision in this case is to place in the hands of labor organizations, no matter how futile and hopeless their strikes may turn out to be, the power to render such disputes "current" or terminated, as they see fit. When the places of all strikers have been filled, operations are normal, and the controversy, for all practical purposes, has reached an end, individuals may, by continuing certain outward manifestations of a strike, such as picketing, maintain the currency of a labor dispute long after its substance has fled and thereby afford to themselves, as "employees", the protection of the Act for an unlimited period of time. This, petitioner respectfully submits, is the effect of a decision in this case that the individuals involved in this case were "employees" of petitioner, and, as such, the objects of discrimination on August 9, 1935.

Petitioner suggests that such a decision involves a question bearing so vitally on present day industrial relations in this country as to render its prompt settlement by this Court a matter of great national importance.

3. The individuals involved in this case were not employees of petitioner at the time the Act became effective and a decision that they became such by virtue of the provisions of the Act denies to petitioner the due process of law vouchsafed to it by the Fifth Amendment.

The decision of the lower Court in giving a retroactive effect to the Act is in conflict with applicable decisions of this Court.

Fullerton-Krueger Lumber Co. vs. *Northern Pacific Railway Co.*, 266 U. S. 435, 69 L. Ed. 367 (1925);

Brewster v. *Gage*, 280 U. S. 327, 74 L. Ed. 457 (1930).

Even before the enactment of the Act the courts recognised the fact that an individual by going on strike did not thereby terminate entirely the employer-employee relationship and become a total stranger to his former employer. It was generally held that, at least for some period of time, the employer-employee relationship continued to exist and the individual assumed the status of a "striking employee". The courts consistently held, however, that such status was removed when the places of all strikers had been filled and the employer had resumed normal operations.

Quintivan vs. *Dail-Overland Co.*, 274 Fed. 56 (C. C. A. 6th, 1921);

Dail-Overland Co. vs. *Willys-Overland, Inc.*, 263 Fed. 171 (D. C. Ohio, 1919);

West Allis Foundry Co. vs. *State*, 202 N. W. 302 (Sup. Ct. Wis., 1925);

M. Steinert and Sons Co. vs. *Tagen*, 93 N. E. 584 (Sup. Jud. Ct. Mass., 1911).

The Board has found in the instant case that the strikers' places had been filled and operations were normal by June 28, 1935 (R. 845). The individuals who went on strike were, therefore, no longer "striking employees" of petitioner when the Act became effective. Cf. *National Labor Relations Board* vs. *Carlisle Lumber Co.*, 94 Fed. (2d) 138 (C. C. A. 9th, 1937), cert. denied 304 U. S. 575, 82 L. Ed. 1539 (1938), and *Jeffery-De Witt Insulator Co.* vs. *National Labor Relations Board*, 91 Fed. (2d) 134 (C. C. A. 4th, 1937), cert. denied 302 U. S. 731, 82 L. Ed. 565 (1937). To hold that on July 5, 1935, the effective date of the Act, they became "employees" of petitioner gives to the Act a retroactive operation and is in direct conflict with the decisions of this Court bearing on the interpretation of statutes.

The lower Court's decision in enforcing the Board's order requiring petitioner to "reinstate" these individuals, who had become total strangers, in a legal sense, to peti-

tioner before the Act became effective, is a decision to the effect that under the Act the Board has authority to order petitioner to *hire* and pay back pay to persons to whom employment was refused because of union activities. As such it constitutes a denial of due process of law and is in direct conflict with applicable decisions of this Court.

National Labor Relations Board vs. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893 (1937);

Associated Press vs. *National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953 (1937);

Coppage vs. *Kansas*, 236 U. S. 1, 59 L. Ed. 441 (1915);

Adair vs. *United States*, 208 U. S. 161, 52 L. Ed. 436 (1908).

4. The Act does not permit the Board to award back pay without reinstatement.

The lower Court's decision enforcing the Board's award of back pay without reinstatement to twenty-two of the persons involved in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit on the same question in *National Labor Relations Board* vs. *Carlisle Lumber Co.*, 99 Fed. (2d) 533, 537 (C. C. A. 9th, 1938).

5. Petitioner is entitled to judicial relief from an excessive and arbitrary award of back pay.

A period of four and a half years elapsed between the commission of the alleged unfair labor practices in this case and the issuance of the Board's Decision and Order. Almost two years passed before the union filed charges and thereafter it took the Board over two and a half years to make final disposition of the case. Throughout this period of time petitioner in no way caused the delay and was helpless to speed up the final determination of its rights

and liabilities. During this whole time back pay, if finally awarded, was accumulating in large amounts. The lower Court's decision in refusing to grant to petitioner any relief under such circumstances involves an important question of federal law which has not been, but should be, settled by this Court.

See *National Labor Relations Board* vs. *National Casket Co., Inc.*, 107 Fed. (2d) 992 (C. C. A. 2nd, 1939);
Matter of Crowe Coal Co., 9 N. L. R. B. 1149 (1938);
Matter of Inland Lime and Stone Co., 8 N. L. R. B., 944 (1938);
Matter of Condenser Corporation of America, 22 N. L. R. B., No. 16, 6 L. R. R. 453 (1940);
Matter of Phillips Petroleum Co., 24 N. L. R. B., No. 23, 6 L. R. R. 560 (1940).

Respectfully submitted,

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APPENDIX

National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C. A. Section 151 et seq.):

Section 2(3):

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

Section 10(c):

> " * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * "